IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 492

MARLON D. GREEN,

Petitioner,

against

CONTINENTAL AIR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR PETITIONER, MARLON D. GREEN

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Prologue

Abraham Lincoln, as President of the United States of America, in his Emancipation Proclamation of January 1, 1863, gave freedom to the Negro slaves, recommended "to them that, in all cases when allowed, they labor faithfully for reasonable wages" and invoked "the considerate judgment of mankind and the gracious favor of Almighty God". (U.S. Statutes at Large, Vol. XII, p. 1268-9, Appendix, Proclamation No. 17.)

One hundred years later, the gracious favor of Almighty God and the considerate judgment of this Court are prayerfully invoked so Marlon D. Green, a Negro, will be allowed to labor faithfully for reasonable wages in his chosen occupation of airline pilot and enjoy a full measure of citizenship.

Opinions Below*

The Findings of Fact, Conclusions of Law and Orders of the Colorado Anti-Discrimination Commission are not reported but are set forth in the Printed Record (223, 226). The opinion of the District Court of the City and County of Denver, State of Colorado, reviewing the orders of that Commission, is not reported but is set forth in the Printed Record (257 to 286). The four-to-three decision, dated September 19, 1960, of the Supreme Court of Colorado on the first appeal to that Court is not in the Printed Record. It is reported in 143 Colo. 590, 355 P.2d 83 (1960). This Court granted certiorari on the second four-to-three decision of the Supreme Court of Colorado. It is reported in 386 P.2d 970. The opinions are in the printed record. The majority—Moore, J., p. 288; the dissenting opinion of Frantz, J. and McWilliams, J., p. 296, and of Pringle, J., p. 309. This last decision was rendered on February 13, 1962 and was modified in keeping with the Petition for Rehearing (311). The Petition for Rehearing was then denied on March 5, 1962 (314).

Jurisdiction

On April 30, 1962, petitioner filed his Petition for Writ of Certiorari to the Supreme Court of the State of Colorado. On October 8, 1962, certiorari was granted.

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* References will be made to page numbers of the printed Transcript of Record.

The Colorado Anti-Discrimination Commission entered its orders on December 31, 1958 and January 7, 1959 requiring Continental Air Lines, Inc. to cease and desist from its discriminatory and unfair employment practices and to give Marlon D. Green the first opportunity to enroll in its pilot training class with a priority status of June 24, 1957 (223, 226). The judgment of the Denver District Court dismissing Marlon D. Green's complaint before that Commission was entered by the District Court on January 7, 1961 (258-286). The four-to-three decision of the Supreme Court of the State of Colorado, affirming the District Court's judgment dismissing Marlon D. Green's complaint before the Colorado Anti-Discrimination Commission, was rendered on February 13, 1962. Petitions for rehearing were filed, the majority opinion was modified and, as modified, the petition for rehearing was denied on March 5, 1962.

The jurisdiction of the Supreme Court of the United States to grant a writ of certiorari was invoked under 28 United States Code, Section 1257 (3), because the validity of the Colorado Anti-Discrimination Act of 1957 was drawn in question on the ground its application to the hiring practices of employers engaged in interstate commerce was repugnant to the Constitution of the United States.

Questions Presented

The Supreme Court of the State of Colorado has held the Colorado Anti-Discrimination Act of 1957 and the hiring orders entered pursuant thereto by the Colorado Anti-Discrimination Commission, are invalid as to employers engaged in interstate commerce because under the Constitut on of the United States only the Congress of the United States has jurisdiction to legislate concerning racial discrimination by employers engaged in interstate commerce. The questions presented are:

1. In the absence of any federal law regulating racial discrimination in employment, is state regulation prohibited by Article I, Section 8, of the United States Constitution?

2. The 1875 Congress of the United States by the unique Enabling Act for the State of Colorado, required that the Constitution of the State of Colorado "shall be republican in form and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Didn't this Congressional commission give the State of Colorado jurisdiction to regulate racial discrimination by employers doing business in the State of Colorado even though engaged in interstate commerce?

3. Whether an employer with its home base and principal office in the State of Colorado that is engaged in interstate commerce can use the silence of the Congress of the United States under Article I, Section 8, of the Constitution of the United States as an iron curtain to protect the employer's discriminatory refusal to hire a qualified Negro as ordered by the Colorado Anti-Discrimination Commission and thus deprive him of liberty, his equal opportunity to employment based on merit and ability, and his civil right to engage in a common occupation of life?

Constitutional Provisions and Statutes Involved

Marlon D. Green filed his complaint under the Colorado Anti-Discrimination Act of 1957 (1960 Supplement—Colorado Revised Statutes 1953, 80-24-1, et seq.) (R. 1). The Congress of the United States, by an act enabling the people of Colorado to form a Constitution, required that

the Constitution "make no distinction in civil or political rights on account of race or color * * *" (18 Stat. 474; 1 Colorado Revised Statutes, 1953, 237 at 238). The provisions of the Constitution of the United States involved are Article I, Section 8 and Article XIV, Section 8.

The pertinent provisions of the Colorado Anti-Discrimination Act of 1957 are: C.R.S. 1953, 80-24-2 (5), which reads:

> "'Employer' shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; * * *"

and C.R.S. 1953, 80-24-6 (1) and (2) which reads:

> "Discriminatory and unfair employment practices.—(1) It shall be a discriminatory or unfair employment practice:
>
> "(2) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry."

The pertinent provision of the Enabling Act from the Congress of the United States to the people of Colorado is found in Section 4 thereof and reads:

> "* * * the said convention shall be and is hereby authorized to form a constitution and state government for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the con-

stitution of the United States and the principles of the declaration of independence; and, provided further, that said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said state; first, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship; * * *"

The pertinent provisions of the Constitution of the United States involved are Article I, Section 8, which reads:

"Powers of congress.—The congress shall have power; * * *

"(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes. * * *

"(7) To establish postoffices and post roads. * * *"

And Article XIV, Section 1, which reads:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case*

Marlon D. Green, a United States Air Force pilot officer with the rank of Captain, was honorably discharged in April, 1957 after a tour of duty in Japan. He was then

* Reference to the record will be made by the record page number, but without the prefix "R" or "tr."

only 27 years of age (167). He was a qualified and federally licensed airplane pilot (33-34). He applied for employment as a pilot with the respondent, Continental Air Lines, Inc., herein called Continental (34-35).

The Continental application forms given Stearns, a United States Navy pilot, and Green, required a photo, race, and descent (Rspt. Suppl. Exs.: 192, 203, 215). Continental's pilot qualifications included: "Age: Not • • • over 30 years—Flight Time: Minimum 2,000 hours" (155, 189).

Green's application was placed on file at the headquarters office at Denver (192, 215). In June, 1957, Continental started to recruit 14 or 15 pilots. Continental invited Green to come to its headquarters offices in Denver for an employment interview (37, 175), not knowing he was a Negro (113-114, 121, 147). When he arrived in Denver, Green was 28 years of age. He took and passed a link trainer and flight test given by Continental (R. 39, 41-46). Fourteen pilots were interviewed for the July class (R. 103). Six, including Green, were found qualified. The flight experience of these qualified six applicants is shown by the following table:*

	Total Hours	*First Pilot*	*Co-Pilot*	*Multi-Engine*	
Green	3071:30	1838:15	778:45	2900:00	(26-32, 92, 215)
George	2100:53	1145:35	874:13	897:23	(199, 220)
Stearns	1200:00	750:00	450:00	934:00	(203, 220)
Bryant	1160:00	1160:00	—	5:00**	(213, 221)
Dresser	1031:00	916:00	—	—	(207, 221)
Cole	1000:00	900:00	100:00	200:00	(195, 222)

* This table is constructed from Green's testimony and the supplementary exhibits requested by the Commission and offered by Continental for the six pilot applicants (R. 192-222).

** Acquired between June 25, 1957, when Green and Bryant were examined, and July 1, 1957.

Continental's exhibit on flight time qualifications showed that all pilots were required to have "Minimum: 2,000 hours (Flight time must be substantiated by certified log or record)" (Respt. Ex. 2; R. 105, 158, 155, 156, 189). Neither Stearns, Bryant, Dresser nor Cole met Continental's minimum flight time requirements (R. 156). Four of the five found qualified with Green were ordered into Continental's July, 1957 training program, and the fifth started in September, 1957 (R. 102, 120, 127). In the August, 1957 class, there were ten additional pilots, in the September, 1957 class, six, and three in the November, 1957 class (R. 102). Continental's Vice President, Personnel, agreed that Green was a qualified pilot (R. 103, 114). Green was never selected for a training class. He was never told he was no longer considered (R. 130), but all other applicants were (R. 103, f. 328, R. 124, f. 360).

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission (R. 1). Continental, in its answer before the Commission, claimed the Commission lacked jurisdiction because the Colorado Anti-Discrimination Act as applied to Continental constituted an undue burden on interstate commerce, and because of federal pre-emption (R. 4-7). It did not plead any statutes of any other state. It claimed the Act's ban against photos on applications denied it the equal protection of the laws and deprived it of property without due process of law contrary to Section 1 of the Fourteenth Amendment.

Hearing was held before the Commission on May 7 and 8, 1958 (R. 7-223). Continental's evidence established that its headquarters offices, hangars, Treasury, and Personnel Offices, were at Denver, Colorado (R. 98, 99); that at Denver it had 800 employees (R. 109); that Continental was an airline certified by the C.A.B., to provide air transportation for persons and property and operated *in* eight states

(R. 108-109); and that only at Denver were flight crew personnel (pilot, flight engineer, and hostess) applicants screened, tested, interviewed, and hired or not hired (R. 97, 98, 99, 103, 106, and 153). In 1957, 178 pilot applicants were brought to Denver for interview (R. 102). About its operation in eight states, it had only a sales office at San Francisco, California (R. 107), and bases at Dallas and El Paso, Texas (R. 109). No evidence was offered on Continental's activity in New Mexico, Oklahoma, Kansas, Missouri and Illinois, whether or not it was only fly-over or sales offices. Continental offered no evidence to show that (a) it was engaged in commerce *between* two or more of the eight states; (b) its operation was in fact interstate; (c) it was treated differently from other employers whether interstate or not, or certified or not by the C.A.B.; (d) the presence or absence of any fair employment practice act similar to or different from the Colorado Anti-Discrimination Act in any of the seven other states, or (e) compliance with the Colorado Anti-Discrimination Act would subject it to any burden, expense, inefficiency, delay, change of pilots in flight, or confusion in interstate operations, or restriction on its right of free passage.

Under its collective bargaining contract with the American Pilots Association, Continental had the right to hire whomever it pleased on a one-year probationary basis. During the one-year probationary period, it had the right to discharge without question (R. 125, 129).

The record did not evidence that Continental was engaged in interstate commerce among the states, nor that the position Green applied for actually involved interstate operations until a court-approved stipulation so agreeing was entered into before the Denver District Court (R. 256), more than 22 months after the order and decision of the Colorado Anti-Discrimination Commission (R. 223 to 227).

On December 19, 1958, the Commission ordered Continental (a) to cease and desist from its discriminatory and unfair employment practices, including its use of an application form asking for "race" and a photograph, and (b) to give Green the first opportunity to enroll in its training school with a priority status as of June 24, 1957 (223). The Commission found that Green was denied employment because of his race, although he was "better qualified for the position of co-pilot than any applicant interviewed" (225).

Continental petitioned the District Court for the City and County of Denver to review the Commission's decision and order, claiming federal pre-emption, and undue burden on interstate commerce (227-229). The Commission answered and petitioned for a Court order enforcing the Commission's order (238).

Green's answer asked the Court, with deliberate speed, to enter a decree enforcing the Commission's order and pleaded the absence of evidence that: (a) the prohibition against discrimination in hiring on account of race or color constituted a burden on interstate commerce, and (b) any law or regulation of the United States or any of its agencies prohibited racial discrimination against prospective employees of interstate commercial air carriers. Green also invoked the requirement of the Congressional Enabling Act for the State of Colorado that the State would "make no distinction in civil or political rights on account of race or color" (246-247).

The District Court for the City and County of Denver remanded the case to the Commission to make findings of fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the Anti-Discrimination Act, and whether the employment for which

Green had applied actually involved interstate commerce. The Commission thereupon made a new decision and purported to vacate its original one, and the District Court then held that the Commission's new action had rendered the complaint moot. Upon review to the Colorado Supreme Court by writ of error, the Colorado Supreme Court held that the Commission was powerless to withdraw its original decision, and that its second decision was void. The District Court was ordered to rule on the first decision of the Commission. (*Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 143 Colo. 590, 355 P.2d 83 (1960).)

The Colorado Anti-Discrimination Commission and Marlon D. Green stipulated with Continental Air Lines, Inc., with District Court approval, that Continental was engaged in interstate commerce among the eight states in which it conducted its business, that the Commission would find Continental was subject to the Anti-Discrimination Act if the record were remanded to it, and that the position Green had applied for involved interstate operations (R. 256).

On January 7, 1961, the District Court for the City and County of Denver held that the Colorado Anti-Discrimination Act could not be constitutionally extended to cover the flight crew personnel of an interstate air carrier. It also held that the Railway Labor Act, the Civil Aeronautics Act, and federal Executive Orders pre-empted the regulation of racial discrimination as applied to interstate air carriers.

The District Court ordered that "a motion for a new trial be dispensed with, and if filed, would be overruled" (R. 286). Thus, no opportunity was given to Green to challenge this state court order on the ground it denied Green equal protection of the laws under the Fourteenth Amendment.

Writ of error was then taken to the Supreme Court of the State of Colorado which, by a four-to-three decision, affirmed the judgment of the trial court on the express ground that the Colorado Anti-Discrimination Act could not be constitutionally applied to the hiring of flight crew personnel of an interstate air carrier as this would put an undue burden on interstate commerce. The majority opinion said "The findings, conclusions, and judgment of the trial court might well be adopted in toto as the opinion of this Court" (293). The controlling principle applied by the majority was "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (294). (*Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, —— Colo. ——, 368 P.2d 970 (1962).)

On April 30, 1962, Green filed Petition for Writ of Certiorari to the Supreme Court of the State of Colorado, and it was granted on October 8, 1962.

On April 30, 1957, Green's application for work was received at Continental's headquarters at Denver (R. 215).

Summary of Argument

The judgment of the Colorado Supreme Court should be reversed because:

I

Congress enacted no federal law prohibiting racial, creedal, and ancestral discrimination by a private employer engaged in interstate commerce.

II

Pursuant to the power vested in Congress by Section 5 of the Fourteenth Amendment, the Congress, in 1875, enacted into the Enabling Act to the people of Colorado a "Civil Rights Bill" requiring: (a) that the State constitution shall make "no distinction in civil or political rights on account of race or color", and (b) that an ordinance irrevocable provide that "perfect toleration of religious sentiment be secured". The Congressional requirement and delegation of legislative authority remained in force after Colorado's admission (*U.S.* v. *Sandoval*, 231 U.S. 28 (1914)). To Colorado, Congress delegated a deposit of legislative authority over civil rights to pass (a) prohibitory legislation providing judicial and administrative machinery to ban discrimination in public employment as required by the Fourteenth Amendment and (b) implementing legislation extending the policy of the Fourteenth Amendment to ban discrimination in private employment. Such a delegation by Congress to enact general civil rights legislation was approved in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1952). To fulfill the purpose of this appropriate Congressional legislative requirement and delegation, the State of Colorado enacted the Colorado Anti-Discrimination Act of 1957 to abolish private employment discrimination "on account of race or color or religion or national origin".

III

Even if Congress had not given express authority to Colorado to prohibit racial, creedal and ancestral discrimination in private employment, Colorado as a state, had the right and obligation under its police power to protect the public interest and safety of citizens of the United States. The *Civil Rights Cases*, 109 U.S. 3 (1883), held that discriminatory acts by individuals were "within

the domain of the state legislature". Under her police power, Colorado enacted the Colorado Anti-Discrimination Act to prohibit discrimination in private employment, areas where neither the Fifth nor the Fourteenth Amendments of the United States Constitution has reached. The Colorado Act goes one step further than the Fourteenth Amendment, and extends Fourteenth Amendment anti-discrimination policies to private employers doing business in Colorado. The Colorado Act extends to all citizens of the United States employed in Colorado by private employers hiring in Colorado the enjoyment of equality of civil rights to engage in the common occupations of life. Such state legislation against discrimination was upheld in *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88 (1945), and in the District of Columbia in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1952). Continental has invoked the wrong constitutional clause, that is, the commerce clause, where its objection to state law should have been the due process clause (*Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 at 598-599 (1959)). Thus, the *Corsi* case has additional force.

IV

Continental's headquarters, all its employment activity and its racial discrimination against Green were concentrated and localized at Denver, Colorado. The record is devoid of any evidence of any hiring activity outside of Colorado. It is also devoid of any diverse law of any other state. Thus, the facts require the reversal of the erroneous conclusion of the Colorado Supreme Court based on its misapplication of the national uniformity test found in *Hall* v. *DeCuir*, 95 U.S. 485 (1878); *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948); and *Huron Cement Co.* v. *Detroit*, 362 U.S. 440 (1960). The latter two cases and the principle of the two former cases clearly require reversal.

V

The Colorado Anti-Discrimination Act prohibiting racial, creedal and ancestral discrimination in private employment in no way burdens interstate commerce. It supplements established national policy and facilitates, rather than impedes, the free flow of interstate commerce.

VI

Even if compliance with the Colorado Anti-Discrimination Act was an inconvenience to an interstate employer of flight crew personnel, it was a much smaller burden than the Nebraska tax on eighteen stops a day sustained in *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 at 598-599 (1954).

VII

The Colorado Anti-Discrimination Act, as applied to Continental, did not conflict with any federal act such as the Civil Aeronautics Act or the Railway Labor Act.

ARGUMENT

I

Congress Enacted No Federal Law Prohibiting Racial, Creedal and Ancestral Discrimination by a Private Employer Engaged in Interstate Commerce.

Congress has enacted no federal law prohibiting racial, creedal and ancestral discrimination by a private employer engaged in interstate commerce. In 1944, Senators Wagner, Murray and others first introduced to the 78th Congress a bill to prohibit discrimination in employment because of race, color, creed, religion or national origin (S. 2048, 78th Congress; S. Rept. No. 1109, 78th Cong.; Sept. 20, 1944,

Cong. Record, Vol. 90, p. 7973). In the Senate and the House of Representatives, a number of similar bills have been introduced, in each session down to and including the 87th Congress. The bills in the 87th Congress, 1st Session (1961), were for federal fair employment practices and federal equality of opportunity in employment (S. 1819, 87th Cong., 1st Sess. (1961) (federal fair employment practices); S. 1258, 87th Cong., 1st Sess. (1961) (federal equality of opportunity in employment)). All of these bills defined employer as a person engaged in interstate commerce. Not one of these bills has been passed. In the absence of a Federal F.E.P.C. law, a state has the authority to subject to its anti-discrimination law employers who are engaged in interstate commerce (*Williams* v. *Int'l Brotherhood*, 27 Cal. 2d 685, 165 P.2d 903).

II

Congress, by Section 5 of the Fourteenth Amendment, Enacted a Civil Rights Bill Into the Colorado Enabling Act and Deposited With Colorado, Legislative Authority Over Civil Rights Legislation Banning Racial and Creedal Discrimination in Private Employment.

Congress, by Section 5 of the Fourteenth Amendment, enacted a Civil Rights Bill into the Colorado Enabling Act and deposited with Colorado, legislative authority over civil rights legislation banning racial and creedal discrimination in private employment.

The pertinent provision of the Enabling Act from the Congress of the United States to the people of Colorado is found in Section 4 thereof and reads:

> "* * * the said convention shall be and is hereby authorized to form a constitution and state government

for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence; and, provided further, that said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said state; first, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship; * * * ".

The Congress of the United States, pursuant to Section 3, Article IV of the Constitution of the United States, admitted the Territory of Colorado to the Union. The Enabling Act was passed by the Congress after the Thirteenth, Fourteenth and Fifteenth Amendments had been adopted. (Thirteenth Amendment, December 18, 1865; Fourteenth Amendment, July 28, 1866; and Fifteenth Amendment, March 30, 1870.) Each of these Civil War Amendments by separate sections thereof stated in substance, as Section 5 of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The legislative history shows that such sections are "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." (*Cong Globe*, 39th Congress, 1st Sess. p. 2766.) Senator Howard further said: "I look upon this clause (Section 5 of the Fourteenth Amendment) as indispensable for the reason that it thus casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the Amendment are carried out in good faith, and that no State infringes

the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and duty."

Two enabling acts for the State of Colorado were vetoed on racial grounds. On May 16, 1866, President Andrew Johnson vetoed the first enabling act for the admission of the State of Colorado into the Union. (39th Congress, 1st Sess.—Senate—Executive Document No. 45.) The second enabling act passed by Congress was also vetoed by Andrew Johnson. His veto message to Congress of January 28, 1867 states as its first ground for veto that the laws of the then territory absolutely prohibited negroes and mulattoes from voting and excluded them from the right to sit as jurors. (39th Congress, 2nd Sess.—Senate—Executive Document No. 7.) The first congressional act for a temporary government for the territory of Colorado (Senate Bill No. 366) ran into heavy Senate debate because under the Bill, the decision of the territorial courts on questions affecting property rights in slaves would have been final and conclusive and there would have been no appeal to the United States Supreme Court. (*The Cong. Globe,* February 26, 1861, pages 1205-1206.)

The Enabling Act for the admission of the State of Colorado to the Union was finally passed in 1875. The congressional debate of February 24, 1875 shows that Senator Hamilton of Maryland moved to strike the requirement that the state constitution should make "no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." He objected that the new state should "have a civil rights bill put in their organic law." (Vol. 3, part 3 and appendix, 43rd Cong., 2nd Sess., pages 1671 to 1690 at 1683.) Objection was made even to incorporating

into the Colorado Constitution the principles of the Declaration of Independence. Senator Merrimon of North Carolina limited the motion to strike to the phrase, "and make no distinction in civil or political rights on account of race or color, except Indians not taxed" (*idem* page 1685).

Senator Sargent, in the debate, made clear not only that this racial proviso was unique but also that the Enabling Act requirement was a reflection of the right of Congress to pass appropriate legislation. Senator Sargent's words were "The Senator from Maryland says that this provision requiring that the new State's constitution shall make no distinction in civil or political rights on account of race or color is now for the first time raised in reference to any new State. This is very true. The Fourteenth Amendment was finally ratified in 1868, four years after the law passed for the admission of Nebraska. There was no provision in the Constitution of the United States at that time guaranteeing these equal civil and political rights, and consequently Congress had no right to require that a new State coming into the Union should provide against discriminations in this manner. After that act was passed, in 1868 the Fourteenth Amendment was ratified, and consequently Congress now has a right, and it is its duty, to insist that a constitution shall be thoroughly republican in form; that is to say, it shall see that there are none of these discriminations which shall 'deprive any person of life, liberty, or property without due process of law,' or 'deny to any person within its jurisdiction the equal protection of the laws.'

"'That is the reason why on account of an enlargement of the horizon, because the Constitution is more effective than it was in those days upon these very matters, because Congress and the people and the requisite number of States by their solemn judgment have determined that these discriminations shall not exist, now more than ten years after

1864 and six years after the adoption of this Fourteenth Amendment to the Constitution of the United States, it is brought forward" (*idem* 1685-6). In arguing that the unique provision of the Enabling Act should be stricken, Senator Merrimon pointed out that each State should have equal dignity and that several states had the power in the exercise of their police powers to make wide and important distinctions in the enjoyment of civil rights. For example, the Southern States had the power in the exercise of their police power to provide that the African race "shall be educated in one class of schools, while the white race shall be educated in another class of schools" (*idem* 1688). When the vote was taken on the motion to strike, it was rejected by 39 to 18 (*idem* 1689).

The Congressional debate indicates, at least in the opinion of some, that the Fourteenth Amendment was passed to prevent "a state from passing a law that no colored citizen shall be admitted to practice law or be allowed to preach the gospel or to teach in the schools or to embark in any other honorable vocation or pursuit of life". (Senator Carpentor of Wisconsin, Cong. Record, 42nd Congress, 2nd Sess., p. 244.)

The Colorado Constitution, as adopted, pursuant to the appropriate congressional legislation giving effect to the national policies reflected in the Fourteenth Amendment, was designed to secure to all persons the perfect equality of civil rights. (Colorado Constitution, Art. II, Sec. 3—Inalienable Rights, Sec. 4—Religious Freedom, Sec. 6—Equality of Justice, Sec. 11—*Ex post facto* Laws and Privileges and Immunities; Art. VII, Sec. 1—Universal Suffrage; and Art. IX, Sec. 8—Banning of religious Test and Racial Discrimination in Public Education.)

The Colorado Constitution expressly incorporates the principles of the Declaration of Independence into its Bill

of Rights (Art. II, Sec. 3). Not only did the Colorado Bill of Rights prohibit slavery (Art. II, Sec. 27), but also gave to persons of foreign origin who resided in the State the right to acquire and dispose of property as native born citizens, and thereby removed the aliens' disability to hold property.

The Colorado Constitution, in keeping with the enabling act of the Congress of the United States, prohibited "any distinction or classification of pupils * * * on account of race or color" in any public educational institution of the State (Art. IX, Sec. 8). This forbade the segregated education of the races as claimed by Senator Merrimon and reflected the national policies declared in 1954 in *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

Article VI, Section 3 of the Federal Constitution declares no religious test shall ever be required as a qualification to any office or public trust under the United States.

The Colorado Bill of Rights, Article II, Section 4, expressly prohibits discrimination and denial of any political right, privilege, or capacity on account of a person's opinions concerning religion. (See *Torcaso* v. *Watkins,* 367 U.S. 488 (1961).)

The Congressional requirements and delegation of legislative authority remained in force after Colorado's admission to the Union (*U.S.* v. *Sandoval,* 231 U.S. 28 (1914)). In fulfillment of the requirements and the delegation by Congress of legislative authority over civil rights, Colorado was empowered to pass: (a) prohibitory legislation providing judicial and administrative machinery to ban discrimination in public employment as required by the Fourteenth Amendment, and (b) implementing legislation extending the policy of the Fourteenth Amendment to ban discrimination in private employment. To fulfill the pur-

poses of the Fourteenth Amendment, and acting under the legislative authority delegated to it by Congress, the State of Colorado, in 1895, passed a Civil Rights Act requiring equal public accommodations by private business (C.R.S. 1953, 25-1-1 to 5). In 1917, it prohibited discriminatory advertising, in 1953, it first prohibited discrimination in employment, and in 1957, passed the Colorado Anti-Discrimination Act here involved. In 1959, it passed the Colorado Fair Housing Act.

The Anti-Discrimination Act of 1957 bars discrimination based on race, creed, color, national origin, or ancestry by employers against employeees or applicants for employment. Its prohibition is directed against discrimination practices carried on by employers within the State of Colorado. It provides the administrative and judicial machinery to redress discrimination in state public employment as an implementation to the Fourteenth Amendment, and it goes one step further than the Fourteenth Amendment by providing the machinery for redress against discrimination in private employment.

III

Colorado, Under Her Police Power, Passed the Colorado Anti-Discrimination Act of 1957 to Extend the Equal Protection and Anti-Discrimination Policies of the Fourteenth Amendment to Private Employers Engaged in Business in Colorado.

By enacting the Anti-Discrimination Act as an exercise of local police power, Colorado also furthered vital and paramount state interests. The *Civil Rights Cases*, 109 U.S. 3 (1883), held that discriminatory acts by individuals were "within the domain of the state legislature." Congress required Colorado to have a constitution and laws not "repugnant to the Constitution of the United States". The

Colorado Anti-Discrimination Act parallels and fulfills the Fourteenth Amendment equal protection prohibition against discrimination in public employment on the basis of race, religion or color, and provides enforcement machinery. (*Schware* v. *Board of Bar Examiners*, 353 U.S. 232 at 238 (1957); see *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).) Congress has not spoken and not passed "appropriate legislation" banning racial, creedal and ancestral discrimination by private employers engaged in interstate commerce. From the silence of Congress is also found its presumed intention that banning such discrimination does not need national uniformity and is subject to local regulation. (Cf. *Cities Service G. Co.* v. *Peerless O. & G. Co.*, 340 U.S. 179 at 186-7 (1950).)

The right to follow any of the ordinary callings of life is a civil right. The area devoid of "appropriate legislation" to ensure this civil right and in which prejudice and discrimination operated was private employment "within the domain of the state legislature". The absence of "appropriate legislation" by Congress applicable to private employers engaged in interstate commerce invited the State of Colorado to pass effectuating legislation equally applicable to interstate and intrastate private employers. An anti-discrimination act of less scope restricted to intrastate private employers would have permitted a dominant number of private employers doing business in Colorado to discriminate in employment on account of race or color or religion or national origin.

Additional reasons for banning discrimination in private employment were Colorado's interest in keeping the peace, utilizing all human resources, preventing unemployment, promoting the state's economy, increasing taxable earnings, and stimulating the sources of investment capital for state development and advancement. (a) The practice of deny-

ing employment opportunity and discriminating in the terms of employment on account of race, color, or religion generates civil strife and disturbances. (b) Discrimination wastes resources in manpower not only of the unskilled and semi-skilled, but also of the skilled. (Buckley, *Discriminatory Aspects of the Labor Market of the 60's*, 19 Review of Social Economy 25 (Mar. 1961); Moorow, *American Negroes—A Wasted Resource*, 35 Harvard Business Review 65 (Jan.-Feb., 1957).) (c) Discrimination stimulates unemployment in the state, with proportionate increases of welfare and relief applicants. It depresses the earnings and purchasing power of all employable persons in the state. (Simpson-Yinger, *Racial and Cultural Minorities*, Rev. ed. (1958), p. 273.) (d) Laws banning prejudice and discrimination in private employment promote the state's economy and also stimulate the free flow of commerce between the states. Where prejudice and discrimination in employment depress purchasing power and the state income and sales taxes, laws banning such prejudice and discrimination increase the taxable earnings and purchases (Simpson-Yinger, *supra*, p. 273). Prejudice and discrimination in employment reduce the potential wealth of the state and the capital of employable persons so such wealth and capital are not available for investment in state development and advancement.

It is a paramount concern to Colorado that the qualified applicant obtain a job demanding his highest skills so he is not a soft target for subversive Communist penetration.* Prejudice and discrimination in employment break the soil for undermining the foundations of a free democratic state.

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* *The Denver Post*, Jan. 24, 1961, p. 14, col. 1, Castro's Communist Cuba offered Marlon D. Green employment as a pilot.

In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 at 41 (1948), in his concurring opinion, Mr. Justice Douglas stated that: "the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination by reason of race or color". He cites as authority for this the United States Supreme Court decision in the case of *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072 (1944). This decision turned upon the constitutionality of the New York Civil Rights law, in particular of Section 43 prohibiting racial or religious discrimination by unions against their members. The union involved in that case was the union of Postal Clerks of the United States Railway mail service. The argument made by the union was that the State of New York, by subjecting the union of Postal Clerks to its anti-discrimination law, violated Article I, Section 8, Clause 7 of the United States Constitution, which established the Federal postal power. In dismissing this argument, the opinion for a unanimous court stated as follows:

> "Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless. *Allen-Bradley Local, U.E.R.M.W.* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749, 86 L. Ed. 1154, 1164, 62 S. Ct. 820, and cases cited. There is no such clear manifestation of Congressional intent to exclude in this case. Nor are we called upon to consider whether Congress, in the exercise of its power over the post offices and post roads, could regulate the appellant organization. Suffice it to say, that we do not find it to have exercised such power so far and thus regulation by the states is not precluded" (326 U.S. at 97).

Mr. Justice Frankfurter, in a concurring opinion, stated:

> " • • • it is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts" (326 U.S. at 98).

The right of local government to pass anti-discrimination legislation was reaffirmed by this Court in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1952), where it was stated, at 109:

> " • • • And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. See *Railway Mail Asso.* v. *Corsi*, 326 U.S. 88, 93, 94."

Neither Continental nor the District Court, in its decision, nor the Colorado Supreme Court, has questioned the authority of the State of Colorado to enact legislation banning racial, creedal, and ancestral discrimination. Each of them has invoked the wrong constitutional clause, that is the commerce clause, where in fact, Continental should have cast its objection to the state law in the words of the due process clause of the Fourteenth Amendment. A similar mistake was made in *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 at 598-599 (1959). When the objection of Continental is considered in its correct aspect, the *Corsi* case has additional force.

IV

Continental's Headquarters, All Its Employment Activity and Its Racial Discrimination Against Green Were Concentrated at Denver, Colorado. There Is No Evidence of Any Hiring Activity Outside Colorado or of Any Diverse Law of Any Other State. There Is No Evidence of Any Burden or Conflict.

Continental's evidence established that its headquarters offices, hangars, Treasury, and Personnel Offices were at Denver, Colorado, where it had 800 employees (R. 98, 99, 109). At Denver, all flight crew personnel (pilot, flight engineer, and hostess) applicants were screened, tested, interviewed and hired or not hired (R. 97, 98, 99, 103, 106 and 153). About its operation in eight states, it had only a sales office at San Francisco, California (R. 107), and bases at Dallas and El Paso, Texas (R. 109). No evidence was offered on Continental's activity in New Mexico, Oklahoma, Kansas, Missouri and Illinois, whether or not it was only fly-over or sales offices. Continental offered no evidence to show that (a) it was engaged in commerce *between* two or more of the eight states; (b) its operation

was in fact interstate; (c) it was treated differently from other employers whether interstate or not, or certified or not by the C.A.B.; (d) the presence or absence of any fair employment practice act similar to or different from the Colorado Anti-Discrimination Act in any of the seven other states, or (e) compliance with the Colorado Anti-Discrimination Act would subject it to any burden, expense, inefficiency, delay, change of pilots in flight, or confusion in interstate operations, or restriction on its right of free passage.

The Colorado Anti-Discrimination Commission was not asked to and did not, on its own motion, take notice of the law of any other state. The Colorado Anti-Discrimination Commission could not have taken judicial notice of general, technical, or scientific facts within its knowledge unless it complied with the Colorado Administrative Procedure Act (Colo. Rev. Stat. 1960 Suppl., 3-16-1 to 6). This Act requires the fact so noticed must be specified in the record or brought to the attention of the parties before final decision, and every party is afforded an opportunity to controvert the fact so noticed (*idem* 3-116-4 (8)).

The record did not evidence that Continental was engaged in interstate commerce among the states, nor that the position Green applied for actually involved interstate operations until a court approved stipulation so agreeing was entered into before the Denver District Court (R. 256), more than 22 months after the order and decision of the Colorado Anti-Discrimination Commission (R. 223 to 227).

Further, at no time had Continental pleaded or introduced in evidence any law of any of the other seven states as required by the settled law of Colorado (*Pando* v. *Jasper*, 133 Colo. 321 at 324, 295 P.2d 229 at 230 (1956); and the settled law of this Court (*Hanley* v. *Donoghue*, 116 U.S. 1 at 6, 29 L.Ed. 537 (1885)).

The only evidence in the record of any law banning employment discrimination is the evidence of the Colorado Anti-Discrimination Act of 1957. The record has no evidence of the presence or absence of any fair employment practice legislation similar to or different from the Colorado Anti-Discrimination Act in any of the seven other states: California, New Mexico, Oklahoma, Texas, Kansas, Missouri and Illinois.

Judicial notice cannot be taken of the laws of another state. When the revisory power of this Court has granted certiorari to determine whether a question of law depending upon the Constitution or laws of the United States has been erroneously decided by the State Court upon the facts before it, the laws of another state or states are fact, which must be proved to be considered. This Court does not take judicial notice of them unless the laws are in evidence and made part of the record. Where the highest Court of the state does not take judicial notice of the laws of other states, those laws, like other facts, must be proved and in the record before they can be considered (*Hanley* v. *Donoghue*, 116 U.S. 1 at 6 (1885), Cf. *Hartford L. I. Co.* v. *Johnson*, 249 U.S. 490 (1919)). It is the well settled law of Colorado that a party who wishes to rely upon the statutes of another state to support his position in a legal controversy must plead and prove such statutes like other facts (*Polk* v. *Butterfield*, 9 Colo. 325, 12 P. 216 (1886); *Pando* v. *Jasper*, 133 Colo. 321 at 324, 295 P.2d 229 at 230 (1956)).

In short, the facts show there was no burden on interstate commerce. Since only Colorado law appears in the record, the facts show no conflict with any diverse state law. The record gives no evidence of a checkerboard (*Hall* v. *DeCuir*, *infra*), nor a crazy quilt (*Morgan* v. *Virginia*, *infra*) of state laws affecting Continental's interstate operation.

When Congress has been silent, Article I, Section 8 of the United States Constitution excludes state legislation when a checkerboard or crazy quilt of state laws discriminates against or embarrasses interstate commerce and the facts demand national uniformity to protect the free flow of that commerce.

The Colorado Supreme Court erroneously, but without citing any, or taking judicial notice of any, must have assumed some undisclosed diverse law of some other state or states that would have produced a checkerboard or crazy quilt of state regulations requiring national uniformity.

It concluded on the basis of *Hall* v. *DeCuir* and *Morgan* v. *Virginia* (R. 294, f. 646):

> "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States."

Green does not waive any rights or expect that this Court will take judicial notice of the laws of any of the other seven states but if this court did take such judicial notice, reason and principle establish the error of the Colorado Supreme Court.

The equal protection clause of the Fourteenth Amendment makes legally impossible a checkerboard or crazy quilt of conflicting state regulation in the field of employment because no state can constitutionally enact a policy of discrimination in employment (Cf. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Takahashi* v. *Fish & Game Comm.*, 334 U.S. 410, 420 (1948); *Truax* v. *Riech*, 239 U.S. 33 (1915)). To illustrate, if the State of Colorado has an anti-discrimination

policy which it applies to flight crew personnel, and the State of Lillywhite has no policy and neither favors nor bans discrimination, there is no risk of interrupting the flow of commerce in the State of Lillywhite or anywhere else. The equal protection clause of the Fourteenth Amendment will strike down any attempt by the State of Lillywhite to enforce a law applicable to flight crew personnel requiring them to be white, gentile, and Anglo.

The factual assumptions of the Colorado Supreme Court do not exist in the record and under the new constitutional doctrine of *Brown* v. *Board of Education*, these factual assumptions could not in the future affect interstate employees (*Boynton* v. *Virginia*, 364 U.S. 454 (1960)). The Colorado Supreme Court based its decision on the traditional test: whether, in the absence of Congressional action, a state law must yield to a need for national uniformity (R. 294, 296). There is no quarrel with the test where the requirements of national uniformity are supported by the facts, but the requirement of non-prejudiced and non-discriminatory hiring is not the type of regulation which is of such a nature as to require exclusive legislation by Congress (*Cooley* v. *Board of Wardens*, 12 How. 299, 319).

The national uniformity test has been applied in many cases where a checkerboard or crazy quilt of state regulatory sources would embarrass, impede and burden the free flow of interstate commerce. Such cases include *Morgan* v. *Virginia*, 328 U.S. 373 (1946) and *Hall* v. *DeCuir*, 95 U.S. 485 (1878). The facts in the former presented a crazy quilt pattern and in the latter, a checkerboard pattern of differing state laws directly burdening interstate carriers, and disturbing interstate passengers with stops at state boundaries for passenger rearrangement to meet the conflicting policies of the differing state laws. This court accordingly found a need for national uniformity in passenger regulations, and said:

"On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be." (95 U.S. 485 at 489.)

The facts in *Morgan* v. *Virginia* (*supra*) showed a crazy quilt of differing and conflicting state laws. Eighteen states prohibited racial separation on public carriers, ten required separation on motor carriers. Exceptions in some state laws were made for interstate passengers with through tickets. In some states, the laws differed in their definition of the amount of Negro blood that made a person colored. From these facts, this Court found the need for national conformity.

The Colorado Supreme Court has misread these cases to mean: "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (R. 294). The mistake of the Colorado Supreme Court is twofold. In the Green case, only the Colorado Anti-Discrimination Act is in evidence. There is no checkerboard or crazy quilt of diverse and conflicting laws. *Hall* and *Morgan* do not establish that

state racial regulations, as such, are an unreasonable burden on interstate commerce. In principle and reason, the regulation of racial and religious prejudice and discrimination does not demand exclusive regulation by a single authority.

An appeal to *Hall* and *Morgan* does not support the paradoxical result reached by the Colorado Supreme Court. The principle of national uniformity established in these two cases was recently applied in *Huron Cement Co.* v. *Detroit*, 362 U.S. 440 (1960), when this Court refused to invalidate a Detroit smog ordinance applied to seagoing interstate ships as an undue burden on interstate commerce. There, as in the Green case, the facts failed to show any "competing or conflicting local regulations". (362 U.S. at 448.)

Racial discrimination by an interstate carrier is a proper subject for state action. A leading decision of this Court supporting the power of the State of Colorado, exercised in the Colorado Anti-Discrimination Act, is *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948). This case accepts the traditional test of *Morgan* and *Hall*. A steamship company operating boats between Detroit and an island in Canada barred admission to one of its boats to a person of the Negro race, thereby violating the Michigan statute prohibiting discrimination in places of public accommodation. The trial court found the company guilty of violating that statute and imposed a fine. The Michigan Supreme Court affirmed. The defendant appealed to the U. S. Supreme Court on the ground that Michigan had no power under the Federal Constitution to use its civil rights statute against a company engaged in foreign commerce, because by doing so the state interfered with such foreign commerce in violation of Article I, Section 8, Clause 3 of the Federal Constitution. The United States Supreme

Court dismissed the appeal. In response to the claim that *Hall* and *Morgan* were controlling, this court ruled:

> "We need only say that no one of those decisions is comparable in its facts * * *
>
> "It is difficult to imagine what national interest or policy, whether of *securing uniformity in regulating commerce*, affecting relations with foreign nations or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here. And, in view of these facts, the ruling would be strange indeed, to come from this Court, that Michigan could not apply her long-settled policy against racial and creedal discrimination to this segment of foreign commerce, so peculiarly and almost exclusively affecting her people and institutions." (Emphasis added.) (333 U.S. at 40.)

Although the *Bob-Lo* case deals with the regulation of "foreign" commerce, the rationale of the decision applies equally to interstate commerce. (333 U.S. at 38.)

In short, the facts in the Green case establish a concentration of Continental's principal business activities and all hiring and discrimination in hiring at Denver, Colorado. By stipulation, it was finally established that Continental was engaged in interstate commerce. Nevertheless, there is no evidence of any burden on interstate commerce. There is evidence only of the law of Colorado. There is no conflict with the law of another jurisdiction. The facts, therefore, show the controlling application of the *Bob-Lo* case.

V

The Colorado Anti-Discrimination Act Prohibiting Racial, Creedal and Ancestral Discrimination in Private Employment in No Way Burdens Interstate Commerce. It Supplements Established National Policy and Facilitates, Rather Than Impedes, the Free Flow of Interstate Commerce.

The Colorado Anti-Discrimination Act as applied to Continental, an interstate air carrier, demonstrates how the Act frees interstate commerce from the obstructive burden of discriminatory employment. Marlon D. Green, with 3,071 flying hours, was rejected because he is a Negro. Continental hired Stearns, Bryant, Dresser and Cole who had less than the minimum flight hours required by Continental's qualifications. These men were put to work flying Continental aircraft in interstate commerce. The Commission found that Green was "better qualified for the position of co-pilot than any applicant interviewed * * * " (R. 225). When the best qualified pilot—who served the Air Force so well—was turned away because his skin is the wrong color and pilot positions were given to the less qualified with a more correct ancestry, are not the lives of all passengers endangered and commerce obstructed by Continental's discrimination?

The free flow of Continental's aircraft into interstate commerce would have been facilitated by the employment of the qualified rather than by the prejudiced preferment of the less qualified.

When state regulations ensure employee competency, or reduce safety hazards without substantial interference with interstate movement of the vehicle, they are found to be an aid to interstate commerce, friendly, not an inter-

ference with it, and are valid. *Smith* v. *Alabama*, 124 U.S. 465 (1888), the state statute requiring interstate railroad employees to be examined for competency, was sustained even though the employees performed their duties in interstate commerce. *Terminal R.R. Assn.* v. *Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943), the statute requiring cabooses on certain trains, is in the interest of public safety.

National policy gives overriding precedence to the civil rights of citizens to prepare themselves by education for, and to engage in, the common occupations of life (*Brown* v. *Board of Education*, 347 U.S. 483 at 493 (1954); Cf. *Shelley* v. *Kraemer*, 334 U.S. 1 (1947); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Cooper* v. *Aaron*, 358 U.S. 1 at 16-17 (1958)). The civil rights of citizens to equal employment must be given overriding consideration in deciding questions of state and national interests. The national policy is expressed in the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is so paramount that the decree of a state district judge is treated as state action denying equal protection of the laws when the decree enforces unemployment on racial grounds. (Cf. *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson, supra*, and *Cooper* v. *Aaron, supra.*) Even if the decision of a state judge is contrary to a state statute, the decree of the state judge is state action within the meaning of the equal protection clause of the Fourteenth Amendment. It is just as invidious and contrary to the Fourteenth Amendment as is a policeman's action in violation of the due process clause (Cf. *Monroe* v. *Pape*, 365 U.S. 167 (1961)).

The application of the Colorado Anti-Discrimination Act by the decision of the Colorado Anti-Discrimination Commission requiring Continental to hire Green, the better

qualified pilot, supplements the established national policy of the Fourteenth Amendment, and would have facilitated the free flow of Continental's aircraft into interstate commerce.

VI

Even If Compliance With the Colorado Anti-Discrimination Act Was an Inconvenience to an Interstate Employer of Flight Crew Personnel, It Was a Much Smaller Burden Than the Nebraska Tax on Eighteen Stops a Day Sustained in Braniff Airways v. Nebraska State Board, 347 U.S. 590 at 598-599 (1954).

In *Morgan* v. *Virginia*, 328 U.S. at 377, the majority recognized the lack of preciseness in the abstract principles used to test whether "particular state legislation, in the absence of action by Congress, is beyond state power". Mr. Justice Black's concurring opinion indicates how there can be uncertainty in the application of these abstract principles when applying "pure questions of policy" under the phrase "undue burden" in interstate commerce. Braniff Airways had its home port and overhaul base for aircraft in Minnesota and flew a circuit with take-offs and landings in fourteen states, including Nebraska. The stops in Nebraska were only for the discharge and loading of passengers and property. The State of Nebraska levied an apportioned ad valorem tax on Braniff's flight equipment. Braniff, like Continental in the Green case, claimed that it was certified by the Civil Aeronautics Authority and was engaged in interstate commerce, and thus, under the commerce clause of the Federal Constitution, it was not subject to state regulation, but only to the exclusive right of the national Congress to regulate commerce among the states. The majority opinion of this court, in *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 at 598-599 (1954), held:

> "In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position. While the question of whether a commodity on route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process."

Continental failed to introduce any evidence of burden on interstate commerce and any evidence of any conflict between state laws. Its objection to the inconvenience of complying with the Colorado Anti-Discrimination Commission's order may, in substance, be an invocation of the due process clause. When the due process clause supports the Nebraska tax on eighteen stops a day on an airline with its home port concentrated in Minnesota, certainly the due process clause supports the application of the Colorado Anti-Discrimination Act to Continental with its headquarters, 800 employees, and all hiring at Denver, Colorado (R. 98, 99 and 109).

VII

The Colorado Anti-Discrimination Act, as Applied to Continental, Did Not Conflict With Any Federal Act Such as the Civil Aeronautics Act or the Railway Labor Act.

Congress has remained silent and not passed a federal fair employment practice act, nor a federal equal employment opportunity act prohibiting racial and creedal discrimination by employers engaged in interstate commerce. Neither the Civil Aeronautics Act nor the Railway Labor Act applies to employment to the exclusion of the Colorado Anti-Discrimination Act.

The Civil Aeronautics Act (49 U.S.C. Section 401, et seq.) regulates passenger rates and services. It does not apply to racial discrimination by employers.

In determining whether or not Congress has pre-empted a field, we can be guided by this Court's statement in the *Corsi* case that "Congress must clearly manifest an intention" to exclude state regulation "before the police power of the state is powerless". The Civil Aeronautics Act, on this test, shows no clear intent by Congress to exclude state regulation.

Continental claims the Railway Labor Act has pre-empted the area. When the argument of pre-emption is made in the area of industrial relations, we are guided by the principle stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) as follows:

> "When the exercise of state power over a particular area of activity *threatened interference with the clearly indicated (federal) policy of industrial relations*, it has been judicially necessary to preclude the States from acting." (Emphasis added.)

The Railway Labor Act (45 U.S.C. 151, et seq.) contemplates the establishment of rates of compensation, hours, and working conditions through collective bargaining. Green could not have been helped or hurt by Continental's collective bargaining contract with the American Pilots Association under the Railway Labor Act. Continental had the right to hire whomever it pleased on a one-year probationary basis. During the one-year probationary period, it had the right to discharge without question (R. 125, 129).

The Railway Labor Act was not intended to be and is not a fair employment practice act (*Hayes* v. *U.P. Railroad Co.*, 88 Fed. Supp. 108 (1950), affd. 184 Fed. 2d 337 (1950)). It does not impose a duty upon the employer to act without discrimination. A duty to act without discrimination is imposed on the statutory bargaining agent, but the statute does not pre-empt the field of race discrimination in hiring applicants for employment (*Steele* v. *Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944), especially the concurring opinion of Mr. Justice Murphy at 208-209, and *Conley* v. *Gibson*, 355 U.S. 41 (1957)). *Conley* holds the Railway Labor Act does not give exclusive jurisdiction to the Railway Adjustment Board over a dispute between a Negro workman and the union so as to preclude a suit for declaratory judgment, injunction and damages.

Clearly, the Railway Labor Act does not expressly protect racial discrimination and does not expressly prevent racial discrimination so as to immunize an interstate carrier from the Colorado Anti-Discrimination Act.

Under the *Garmon* and *Corsi* principles of pre-emption, the Railway Labor Act does not manifest a clear intention of exclusion and the Colorado Anti-Discrimination Act does not threaten interference with a clearly indicated federal policy of industrial relations.

The policy of federal industrial relations prescinding from racial discrimination was first reflected in the National Labor Relations Act. One year after that Act was held constitutional by this Court, it said in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938): "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."

In federal industrial relations, neither by the Railway Labor Act nor the Civil Aeronautics Act did Congress evidence an intent to pre-empt the field and establish a ban against discrimination in employment by employers engaged in interstate commerce. It is admitted that Congress could have pre-empted the field by enacting a federal fair employment practice act with a clear statement of intention that the application of state fair employment acts did not apply to interstate commerce, but as was mentioned above, such a federal law has not been passed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment and decision of the Colorado Supreme Court be reversed. Further, Green asks this Court also to consider the entire case and to indicate its approval of the order of the Colorado Anti-Discrimination Commission so the litigation will be cut short. Otherwise, Continental will benefit from its discrimination by protracted delay.

Respectfully submitted,

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January 11, 1963